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Subject: Tunney Act Comments

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MS Word document attached, plain text below.

Tunney Act Comments
by Jim Wiedman

I am a Computer System Administrator with experience maintaining Operating
Systems from numerous vendors including Microsoft. Over the past seven
years I have grown increasingly frustrated by the severe limitations in
Operating System choice. I have frequently had to pick an Operating System,
not because it was the best for the job, but because it was the only OS that
would work with the required software. Because of Microsoft?s monopoly,
this situation has grown increasingly worse. For this reason, I felt
compelled to comment when I realized how poorly the agreement between the
United States, nine of the plaintiff states and Microsoft (henceforth, the
Agreement) will protect consumers.

        The Agreement between Microsoft and some of the plaintiffs is surprising in
that it is dramatically less comprehensive than the earlier decision in the
District Court and the unanimous decision by the Circuit Court would
warrant. More importantly, this agreement, rather than preventing
Microsoft?s abuse of its monopoly, actually protects Microsoft as it extends
its monopoly into new areas.

        According to the government?s ?Competitive Impact Statement?, page 24,
because Microsoft put up a barrier to competition in the form of blocking
competing Middleware, the remedy must be to prevent Microsoft from blocking
future Middleware. This does not follow. The Agreement is the anti-trust
version of closing the barn door after the horse has been stolen. Since
overcoming its challenges from Netscape and Java, Microsoft is structuring
Windows in such a way as to be immune from future competitive Middleware
products. Nothing in this agreement deprives Microsoft from the benefits
received from their abuse of monopoly, and very little in this agreement
will restore competition to the industry.

There are numerous loopholes in this agreement. Section III.H (page 6)
allow Microsoft to invoke its own Middleware in any instance when the
Middleware ?would be invoked solely for use in interoperating with a server
maintained by Microsoft . . .? Through its .Net strategy, Microsoft is
already moving toward a model where each end user system will do more and
more work with Microsoft servers. This restriction is already well on its
way to obsolescence. Despite government assurances to the contrary, the
plain language of the agreement allows Microsoft to restrict ?portions of
the APIs or Documentation or portions or layers of Communications Protocols?
that deal with security. Section III.J.1. While at first this restriction
seems reasonable, this exception swallows the rule. Recently, Microsoft
Chairman Bill Gates has announced that every aspect of Microsoft programming
will put security first and foremost. While this emphasis at Microsoft is
long past due, it also gives them ample opportunity to exclude programs from
interacting with Windows.

Requiring Microsoft to ?[a]llow end users . . . and OEMs . . . to enable or
remove access to each Microsoft Middleware Product . . .? is inadequate.
Section III.H1. , page 5 (emphasis added). This neglects two things: 1)
removing access leaves the bulk of the unused program taking up space on a
user?s hard drive, thus ensuring that end users who chose a competing
product may require twice as much disk space (Microsoft?s product, plus the
competitor?s product) as they would if they stuck with Microsoft?s product,
and 2) even after an end user or OEM has chosen to remove access to a
Microsoft product, Microsoft can restore access to that product in seconds,
while end users may be required to take hours downloading a competitor?s
product. This requirement is practically meaningless.

Further, the Agreement is vague. Phrases like ?complies with reasonable
technical specifications? invite varied interpretation and abuse. Agreement
page 3.

Weak Enforcement Mechanisms

The Agreement includes too many sections that leave enforcement up to
Microsoft itself. Microsoft can exclude anyone from access to APIs that it
deems has no ?reasonable business need for the API??. Language from the
Agreement includes ?established by Microsoft for certifying the authenticity
and viability of its business,? or ?approved by Microsoft?. Section III.J.2
page 7.Microsoft has too much control over its own anti-trust enforcement,
something they have proven incapable of doing in the past.

By using MSDN to give access to those who wish to work with APIs, Microsoft
can restrict vendors from sharing products created using Microsoft APIs.
This would require each separate vendor to create independent tools, and
discourage standardization. This reinforces Microsoft?s control over the
industry. Further, access to MSDN is expensive and nothing in the Agreement
controls the price of this access. Using MSDN and a vehicle for API access
gives Microsoft an immense amount of control.

The primary weakness is the committee that the Agreement proposes to monitor
the agreement. Section IV.B establishes a ?Technical Committee? (TC) to
oversee compliance with the Agreement. It is problematic that a group of
three technical people will be responsible for ensuring the enforcement of a
complex and vague agreement, but this is not the most pressing problem with
this section.

The Agreement gives Microsoft an incredible amount of influence over the
Technical Committee. First, Microsoft gets to directly chose one-third of
the Committee. Secondly, Microsoft?s choice for the committee gets to help
choose another committee member. Thirdly, after the TC has been at work for
thirty months, these two committee members will rely, directly or
indirectly, on Microsoft?s approval. If these committee members have acted
in a way that displeases Microsoft, they can be certain of finding
themselves unemployed at the end of their first term. Finally, by
establishing the committee?s main office on the Microsoft campus, Microsoft
has an immense direct opportunity to influence the committee.

Further, Section IV.B.5. Allows removal from the committee only on the U.S.
governments initiative, not that of other plaintiffs in the case.

Section IV.B.8 does not explain what vote of the TC would be required to
report violations or settle disputes. Must these be unanimous votes? Can
any member initiate such action? This is too vague and leaves too much open
for abuse.

Agreement excludes the only serious competition to Microsoft

Evidence is mounting that OpenSource software allows for the only viable
competition to Microsoft, yet Section III.J.2 excludes OpenSource projects
and government agencies from access to network protocols and APIs.
According to the definitions section, ?ISV?, Section VI.I, means ?an entity
other than Microsoft that is engaged in the development or marketing of
software products.? (Emphasis added). While this definition should include
private OpenSource developers, the ?V? in ?ISV? suggests ?Vendor?, and other
sections of the Agreement state that Microsoft can require these entities to
be ?businesses?. This certainly was written to exclude OpenSource projects.

Thus, the Agreement allows for the exclusion of a vast number of private
programmers who work on independent projects. These projects including
SAMBA, Apache, Openssh, Linux and a plethora of others are the primary
forces competing with Microsoft. Microsoft competitors such as IBM, Apple,
Hewlett-Packard, RedHat and others have used projects created and maintained
by these independent programmers as foundations for their software
offerings. Independent programmers provide standards that disparate
computer vendors can rely on, which lets these businesses compete on a fair
footing, while consumers benefit from products that work together. By
excluding these programmers from access to the Windows API, the Agreement
hinders the very tool that will allow all computer vendors (Microsoft

included) to compete fairly.

This agreement is not in the public interest and should be reworked to resolve the deficiencies outlined above.

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